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Arnold Machinery Company v. Clifford A. Prince dba Prince Construction Company and Western Surety Company Inc. : Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ARNOLD MACHINERY COMPANY,
a Utah corporation,
Plaintiff-Appellant,
vs.
CLIFFORD A. PRINCE, dba
PRINCE CONSTRUCTION COMPANY
and WESTERN SURETY COMPANY,
INC., a corporation,
Defendants-Respondents.

Case No. 14337

REPLY BRIEF OF APPELLANT

ARNOLD MACHINERY COMPANY

APPEAL FROM JUDGMENT
of the
DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH
Honorable Bryant H. Croft

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TABLE OF CONTENTS

CASES AND AUTHORITIES CITED

STATUTES CITED

IN THE SUPREME COURT

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ARNOLD MACHINERY COMPANY, a Utah corporation, Plaintiff-Appellant, vs. CLIFFORD A. PRINCE, dba PRINCE CONSTRUCTION COMPANY, and WESTERN SURETY COMPANY, INC., a corporation, Defendants-Respondents.	CASE NO. 14337

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STATEMENT OF FACTS

We refer to Western's points in the sequence used by it, footnoting references to page numbers of Western's brief.

The statement of facts, and later references thereto in the argument of respondent Western, go far beyond the record in this case and lose sight of the issue to be decided: Was Judge Croft in error in ruling that Western's liability on its bond was subject to a one-year statute of limitation?

Western discusses a prior federal court action. There is nothing in the record thereon. Some of Western's discussion is factual; some is not. For instance, Western's statement that a federal court action was begun "one day after the one-year termination"[1] is erroneous. In order to refute that statement, we too must go outside the record and state that the federal court action was commenced October 30, 1974, whereas the complaint alleged the furnishing of the last material on October 30, 1973. There was an amended complaint dated and filed October 31, but the original complaint had been filed, and the action had been commenced, the day before. The record does not show the reasons Arnold seeks recovery against the subcontractor and its surety, with whom Arnold dealt, instead of against the contractor and its surety, with whom Arnold had no dealings, or against all. All are not necessary parties. The issue, however, is not the merits or demerits of the federal court action, but whether or not a one-year limitation applies to this action on Western's bond.

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1 P. 13

ARGUMENT

Point I

The Relief Sought on Appeal is Appropriate

Western argues that, because it had sought and obtained dismissal from the case, it should not be bound by the decision herein adjudicating the amount the subcontractor Prince owed the materialman Arnold.[2] Western chose not to remain in the action to litigate the question, and should not now be heard to say it is not bound by the adjudication. Prince had the incentive to oppose the motion for summary judgment and did in fact oppose it. The doctrine of conclusiveness of judgments against persons derivatively responsible is applicable in the case of indemnitors.[3]

Western reasons that, because there was an amended complaint filed after Western was dismissed from the case, some new issues were brought in, such as a credit memorandum for offsets due Prince.[4] The file shows that the only thing done by the amended complaint was to allege that the amount claimed in the original complaint had been agreed to by Prince, creating an account stated. Western would be bound on either theory of liability.

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2 P. 10

3 46 Am.Jur.2d Judgments, par.551

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Western asserts that the offsets which Arnold had recognized were due Prince may have been attributable to something other than the Fish Lake project on which Western issued the bond.[5] Western can hardly object that Prince and it are getting a credit, regardless of its source.

Western argues that Prince's liability on its contract with Arnold for attorney's fees incurred by Arnold to collect for the material furnished could not be imposed upon Western.[6] The authorities on such liability of bonding companies are contra.[7]

Point II

The Bond Running to Tolman is for the Benefit of Tolman and Materialmen

Western argues that the language of the bond is not broad enough to include anyone but Prince as a beneficiary, and quotes the language of the bond naming Tolman as the one to whom Western is bound.[8] The

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5 P. 11

6 P. 11

7 Dale Benz, Inc., Contractors, v. American Casualty Co. (CA9 Ariz) 303 F2d 80.
National Surety Corp. v. U.S. (CA5 Tex) 327 F2d 254, cert den 379 US 819, 13 L ed 2d 30, 85 S Ct 38.
State ex rel.Grinnell Co. v. E. H. White Co. (Or) 356 P2d 943.
H. Richards Oil Co. v W. S. Luckie, Inc. (Tex Civ App) 391 SW2d 135.

whole contract theory of third-party beneficiary liability is that, whether or not named, the party for whose benefit a contract is made may claim thereunder.[9]

As discussed under the Statement of Facts, Western assumes that a prior federal court action was brought one day after the Miller Act one-year limitation had run. Socony-Vacuum Oil Co. v. Continental Casualty Company 219 F.2d 645, quoted extensively hereafter because of its similar fact situation, holds that the subcontractor's bondsman is liable to the materialman if the Miller Act limitation period has barred a claim under the Miller Act bond.

The language of the condition of the bond shows that liability to Arnold exists. It is conditioned upon three things: (1) performance of the contract by Prince, and (2) indemnification of Tolman by Prince, and (3) prompt payment of materialmen.[10] Western dwells upon the second point, indemnification of Tolman, and argues that if Tolman is not liable and therefore does not need indemnification, there can be no liability to anyone under the bond. That argument ignores the other two conditions, and particularly the third condition as to prompt payment of materialmen. A contractor is not solely interested in indemnification,

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[9] DeLuxe Glass v. Martin 116 U. 144, 208 P.2d 1127,1130

[10]

which is the reason that the other two conditions are put into the bond. A contractor is interested not only in protecting himself from claims of materialmen but also in having the job completed and paid for so that the contractor does not become involved in the time and effort required in settling claims, litigation, attorney's fees, and damage to business reputation, which necessarily flow from a construction job on which subcontractors go broke.

The fact that the contractor, Tolman, is not a party to this action, he not being a necessary party, is no indication that Tolman is disinterested in having the materialmen paid.

Western attempts to distinguish DeLuxe Glass v. Martin (supra), wherein this court held that, despite the fact that the bond did not have a provision therein expressly recognizing rights of third party beneficiary materialmen, the third party beneficiary materialman could sue the bonding company. Western's attempted distinction is based upon the premise that in DeLuxe the named beneficiary was liable to the materialmen.[11] That premise is unfounded. In DeLuxe

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11 P. 17

the court held that the named beneficiary-owner had complied with the bonding statute and therefore was not liable to the materialmen. It, nevertheless, held that the materialmen, even though not named as beneficiaries, had a direct right of action under the bond. Western quotes the following language:

> It follows that should the owner be required to pay the debts in question, the surety would be liable under the bond to the owner in precisely the amount which it is, by judgment below, required to pay the creditors.

Taken in context, this was the alternative holding by the court, that if the bond had been held to be inadequate under the bonding statute, and "viewing the bond as a common-law obligation," the owner-beneficiary was liable to the materialmen for not having furnished the statutory bond, and the bonding company would nevertheless be liable. In other words, the court in DeLuxe was not basing its ruling, that an unnamed third party beneficiary of a bond could sue, on any such premise that such right is dependent upon the liability of the beneficiary to the materialmen.

Western further argues as a point of distinction that "Tolman has no claim against Prince or the Western Surety Company."[12] Western does not explain why the named beneficiary, Tolman, could not successfully claim

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12 P. 17

not only under the subcontract with Prince, but also under the bond furnished, wherein Prince was the principal and Western was the surety, that the materialman Arnold must be paid as agreed to under the contract and bond.

In Utah State Building Board v. Walsh Plumbing Co. 16 U.2d 249, 399 P.2d 141 the opposite contention was being made, that only the unnamed third-party beneficiary materialmen could sue and that, if they had not claimed in time, the named beneficiary could not sue. This court rejected that contention. In doing so, it recognized that materialmen could sue even though not named in the bond, but that they were not the only ones protected. The court also recognized that the bond was given not only "to carry out the overall objective of construction and delivering a debt-free building," but also to protect materialmen.

We conclude, from the above, that Arnold, although not named in the bond, is one of the beneficiaries thereof.

Point III

Plaintiff's Sole Remedy is Not in the Federal Court

The ruling of Judge Croft was partially correct, wherein he determined that the remedy under the federal

Miller Act was not an exclusive remedy.[13]

Under this point, Western continues to argue, and cite authority to the effect that, if Tolman is liable to Prince's materialman, Prince and his surety, Western, would be liable to Tolman.[14] That is almost axiomatic, and we agree. The converse, however, is not true, nor is any authority cited, that Western's liability to Arnold is dependent upon Tolman's being liable. As analyzed above, DeLuxe expressly holds to the contrary, that the bonding company was liable to the materialman even though the named beneficiary was not liable to the materialman.

Arnold has chosen to claim against the bonding company of the subcontractor with whom it dealt, rather than against the bonding company of the contractor with whom it had no dealings. Another bonding company's having also agreed to pay materialmen should be no defense to Western. The beneficiary of two separate agreements to make the same payment should be able to sue either or both of the promisors.

Western cites the New York case of McGrath v. American Surety Co. of New York 122 N.E.2d 906, and

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13 R. 73-75

14 Pp. 18-22

quotes therefrom, extensively, language wherein the court was attempting to determine what the "intention of the parties" was in issuing and obtaining a subcontractors' bond.[15] The New York court found, as a matter of fact, that the intention of the contracting parties was solely to protect the prime contractor from liability under the Miller Act, and ruled that the subcontractor's bondsman therefor was not liable to a materialman.

The reasoning of this case was severely criticized in Socony-Vacuum Oil v. Continental Casualty Co. 219 F.2d 645, 647, 648, 649. There, in a similar fact situation, the Second Circuit refused to follow McGrath. The court said:

> (2) Professor Corbin in his work on law of contracts, 4 Corbin on Contracts, Sections 798-804, has this to say: "* * the third party has an enforcible right if the surety promises in the bond, either in express words or by reasonable implication, to pay money to him. If there is such a promissory expression as this, there need be no discussion of 'intention to benefit'. We need not speculate for whose benefit the contract was made, or wonder whether the promisee was buying the promise for his own selfish interest or for philanthropic purposes. It is a much simpler question: Did the surety promise to pay money to the plaintiff?" See also Corbin, "Contractor's Surety Bonds," 38 Yale Law Journal 1. This doctrine, we think, has the support of the great weight of authority. A long line of cases cited to such doctrine in 77 A.L.R. 53 amplifies the cases which Professor Corbin

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particularly cites.

We are unable to recognize either the validity or the relevance of the conclusion of the trial judge that the bond was given only for the benefit of the prime contractor and not for the protection of materialmen. Doubtless the prime contractor in requiring a bond of its subcontractor sought protection against his own liability to materialmen of the subcontractor. But this he obtained through a bond requiring the payment of the materialmen. Obviously it was contemplated that performance under the bond would benefit not only the prime contractor who would thereby be exonerated from liability to the materialmen thus paid but also the materialmen of the subcontractor who were thereby to be paid.

(3) But this aside, we think it was wholly irrelevant for the trial judge to speculate as to the motives of the parties of the bond. The scope of the bond, like any written contract, must be determined not by the unexpressed motive of the parties but rather by the ordinary meaning of the words which they used. By this simple test, the defendant here was plainly obligated to pay "material obligations" such as that sued on here.

The situation is affected not at all by the fact that the plaintiff failed to perfect its rights under the Miller Act against the prime contractor and its surety. The bond now sought to reach was not one required under that Act and the rights to which it gave rise are not qualified by the Act or conditioned upon the timely pursuit of remedies under that Act. The rights under this bond must be determined by its language interpreted as of the date it was given. At that time, of course, it was not known whether all or some of the materialmen would fail or decline to press their rights under the Miller Act.

Moreover, the bond was conditioned not only on the payment of "material obligations" but also on reimbursement to the obligee of "all loss and damage which said obligee may sustain by reason of failure or default on the part of said Principal." This latter branch of the condition was broad enough to

protect the prime contractor against claims of materialmen which through timely prosecution had actually caused loss to the prime contractor or his surety. The branch of the condition calling for payment of material obligations without limitation to those which might be timely prosecuted under the Miller Act imports an intent that all were to be included within the obligation of the bond.

...But both the Spokane and the McGrath cases and others of similar purport we think out of line with the great weight of authority referred to above. With deference, we suggest that it is unfortunate doctrine to modify the scope of a plainly stated written obligation in a private bond by the supposed motive of the obligee, as these cases seem to do. Such doctrine leads to unnecessary and undesirable uncertainty in business relationships. It means that one within the orbit of a private bond cannot rely upon a plainly stated obligation; instead he must search for the undisclosed motive of the parties and take that as the measure of his rights.

...To say that the object of the bond was only to protect the obligee against liabilities imposed upon him by the Miller Act overlooks the fact that the bond was not required by that Act and calls for the payment of "all labor and material obligations" without express limitation to liabilities of the obligee under the Miller Act. In our view, the object of the bond was to accomplish the payment of these obligations and by such payment to provide protection to the obligee. If the obligee sought indemnity only or if it wished to exclude third parties from benefit under a surety bond, the natural presumption is that it would not have required a surety's payment bond. But here the prime contractor required a payment bond and paid the premium for a payment bond, at least indirectly under the terms of the subcontract whereby the subcontractor made the direct payment. And the defendant in return for the premium, furnished a payment bond. It follows that the surety should not be allowed to avoid the obligation which it was paid to assume by suggesting that as things turned out the obligee did not need all the protection which was bargained and paid for. Were we to hold otherwise, we should in effect, by substituting a

mere contract for indemnity for the bond which was made, be presenting the defendant surety company with an unearned windfall.

This court in DeLuxe (supra) has shown that it would follow Socony instead of McGrath. In DeLuxe this court said that it would recognize the right of a materialman to recover from the bonding company regardless of the "intent" of the contracting parties:

> "It is not always quite clear what is meant when the courts say that the 'intention' of the parties is controlling. There does not seem to be any basis for holding that, although a performance of the contract will necessarily and directly benefit the third person, his remedy depends upon an intention on the part of the parties to the contract that he shall have the right to sue thereon. While the intention of the parties controls in the creation of rights under the contract, and in determining the things required by the contract to be done by the parties, it would seem that, once the right is created or the duty is imposed in favor of the third person, the law furnishes the remedy, regardless of the intention of the parties in respect thereof.
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> "* * * So long as the contract necessarily and directly benefits the third person, it is immaterial that this protection was afforded him, not as an end in itself, but for the sole purpose of securing to the promisee some consequent benefit or immunity. In short, the motive, purpose, or desire of the parties is a quite different thing from their intention. The former is immaterial; the intention, as disclosed by the terms of the contract, governs. It is to be borne in mind that the parties are presumed to intend the consequences of a performance of the contract. That which is contemplated by the terms of the contract is 'intended' by the parties. 'The distinction between the motive which leads a person to enter into a contract, and the intention deducible from the terms of the contract as it is written, is a very clear one.' * * *" (Citing cases).
>
> (5) Clearly, the bond in this case was "intended" to directly benefit the materialmen, as that expression is above defined. They, therefore, are entitled to maintain this action.[16]

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Consequently, Arnold's sole remedy is not to bring an action in the federal court under the Miller Act.

Point IV

One-Year Limitation is Inapplicable

Western argues that Arnold "...takes the position that we here have a bond which is not a bond...and that none of the many bond limitations...are of any weight."[17] That is not Arnold's position. The position is, rather, that none of the particular statutory provisions as to particular bonds, relied on by Judge Croft and Western, applies to the common-law bond.

Western attempts to distinguish Rader v. Manufacturer's Casualty Insurance Co. of Philadelphia 242 F.2d 419, on the ground that the particular bond involved was not a "payment bond."[18] We recognize that there is such a distinction, but feel it is a distinction without a difference. The point the case establishes is that, if the bond is not of the type required by a particular statute, a statute of limitations relating to commencement of suit under such bond is inapplicable to a collateral bond issued in the same transaction, but not of the type required by the statute.

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17 P. 25

18 P. 23

Western argues that Utah decisions recognize the similarity between the mechanics' lien and bond statutes and decisions.[19] With this we have no quarrel. However, the statutes are not identical and there are different requirements for various things including the following: A lien claimant must file within 60 to 80 days after completion of contract under 38-1-7, whereas no time is provided for filing a claim under a bond required by 14-2-1; a lien claimant must sue within 12 months after completion of contract under 38-1-11, whereas one claiming for failing to furnish a bond must sue within one year from furnishing last material, 14-2-2.

The assumption of Western, therefore, that the lien and bond statutes are interchangeable cannot be sustained despite the language contained in Carlisle v. Cox[20] recognizing their similarity.

Western argues that "all bond statutes contain the imposition of one-year statutes of limitations."[21] We concede that the ones cited by Western contain a one-year limitation, but each one cited refers to a particular type of bond and none of them purports to cover

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19 Pp. 15, 24

20 29 U.2d 136, 506 P.2d 60

21 P. 24

"common-law" bonds. This court recognized in DeLuxe (supra) that there can be, and are, common-law bonds in stating:

> Disregarding the quoted statute and viewing the bond as a common law obligation, the weight of authority is to the effect that under the bond here involved, the circuity suggested by what is said in the preceding paragraph is not here required; and that under such bond the plaintiff and interveners may sue the surety.[22]

The rationale used by the court in its decision in DeLuxe was to consider the bond, there in question, first from the point of view of its being a common-law bond and second from the point of view of its being a bond required by statute, and reaching the same result from both approaches.

Western quotes 14-2-2 as providing:

> "actions to recover on liabilities shall be commenced within one year from the last date that the materials were furnished or the labor performed." (emphasis added)[23]

This is a misquote, which undoubtedly was unintentional, but it nevertheless reflects the mistaken rationale used by Western. The correct quote of the statute is:

> "actions to recover on such liability shall be commenced within one year from the last date that the materials were furnished or the labor performed." (emphasis added)

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[22] 208 P.2d 1127, 1131

[23] P. 25

The correct quote shows that this one-year limitation is referring to "such liability" as referred to in the chapter.

Western argues that Oscar E. Chytraus Company, Inc. v. Wasatch Furnace and Electric, Inc.[24] applies the one-year limitation in 14-2-2 to a situation in which there was an action on the bond, as distinguished from an action for failure to require a bond. We concede that the court did so, but feel that, in so doing, the court did not consider the distinction we make, that the one-year limitation by the very terms of the act is applicable to "any persons subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond..." (emphasis added). Such a distinction was not discussed in the opinion. We cannot see how the statute can be construed as being applicable to a situation in which a bond was furnished, when the language is otherwise, despite the reasoning in Chytraus. The principal reason, however, that we argue that the one-year limitation of 14-2-2 does not apply is that it relates to a private owner's duty to require the contractor to furnish a bond, and not to a federal project contractor's voluntarily obtaining a bond.

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[24] 28 U.2d 338, 502 P.2d 554

This is further emphasized by the above-quoted language of the Act which limits its applicability to "any persons subject to the provisions of this chapter."

Western argues that Arnold is inconsistent in saying on the one hand "that the situation was not one concerned with federal law...then analysing that it was not a state project but rather a federal project."[25] This is a misstatement of our position, which is that the work was on a federal project and was not, therefore, the type of project in which a bond is required of an owner improving his land under a private contract.

Western argues that "if state laws should apply" the contractor requiring a bond not required by statute should be treated as if he were "the owner," who is required by statute to obtain a bond, pursuant to which there would be a one-year limitation.[26] This is a non-sequitur. Each particular state statute involved has to be examined to determine whether or not it applies. If state law applies, all "state laws" do not. Whether or not a particular state law "should apply"[27] must be

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[25] P. 27

[26] P. 27

[27] P. 27-28

determined by the language used by the legislature. If the legislature intended a limitation of one year to apply on all bonds, it would have said so.

Western argues that the contractor Tolman's requiring the furnishing of a bond by Prince was a "private contract" which is "analogous and similar to that provided for in Section 14-2-1."[28] Western then concludes therefrom that, since it is similar to a situation in which a bond is required and a limitation period provided for, the statute should apply. If that had been the legislative intent, the legislature would not have required an "owner of any interest in land" to furnish a bond but would have said "anyone entering into a contract."

Probably the most venerable case ever cited to any personnel of this court is Victor Sewing Machine Co. v. Crockwell et al 3 U.152,1 P 470 (1882), judgment affirmed Streeper v. Victor Sewing Machine Co. 112 U.S. 688, 5 S.Ct. 327, 28 L.Ed. 852. This case holds that the applicable statute of limitations for a bond guaranteeing payment is that applicable to an action on a written instrument, which was then four years but is now six years. The case has been cited with approval and never overruled.

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28 P. 28

CONCLUSION

Arnold here seeks recovery from the subcontractor and its surety, with whom Arnold dealt. Arnold does not also seek recovery from the contractor and its surety with whom Arnold had no dealings.

Prince agreed to pay the materialman, Arnold, and furnished a bond expressly providing that materialmen would be paid. Arnold obtained a judgment against Prince, and now should be able to hold Prince's surety liable for the very thing it expressly obligated itself to pay.

Judge Croft was in error in ruling that Arnold's claim against the surety is barred by the one-year statute of limitations in 14-2-2.

Respectfully submitted,

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